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IN THE

**SUPREME COURT OF THE UNITED STATES**

October Term, 1991

SPECTRONICS CORPORATION,

*Petitioner,*

*v.*

H.B. FULLER COMPANY, INC. AND  
H.B. FULLER AUTOMOTIVE PRODUCTS, INC.,

*Respondents.*

**PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT**

**PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED FOR REVIEW

1. Must a declaratory judgment action be dismissed for lack of controversy when a patentee who has terrorized plaintiff's customers cancels all of the patent's claims and issues a statement of non liability, but files a reissue patent application in the Patent and Trademark Office directed to the same subject matter, and continues to use a patent marking on its widely sold goods with resulting impact on plaintiff's sales to its customers, thereby creating an objectively reasonable apprehension on plaintiff and its customers about a future suit based upon the reissue patent?

2. Can a patentee deprive the plaintiff in a declaratory judgment action from demonstrating fraudulent patent procurement by cancelling all of the patent's claims, issuing a statement of non liability, while filing a reissue patent application directed to the same subject matter in the Patent and Trademark Office which has adopted the policy of refusing to investigate and reject original or reissue patent applications for fraudulent procurement?

3. May the Patent and Trademark Office refuse to consider fraudulent procurement of a reissue patent application notwithstanding this Court's explicit directive to do so in *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.*, 324 US 806, 818 (1945), and this Court's recognition of the far-reaching social and economic consequences to the public of a fraudulent patent monopoly?

### **STATEMENT UNDER RULE 28.1**

The petitioner, Spectronics Corporation, has no parent, subsidiary nor affiliated companies.

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**PETITION FOR WRIT OF CERTIORARI**

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit entered in its No. 91-1041 on July 29, 1991.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit is reported at 940 F.2d 631, and is reproduced in the Appendix hereto at A-2 to A-13.

The Order of the District Court was rendered on August 17, 1990, and is reproduced at A-14 to A-15. It incorporated by reference the Court's statements in discussions with counsel on the record at oral argument held on August 17, 1990. The seminal portion of such statements is reproduced at A-16.

## JURISDICTIONAL STATEMENT

Invoking federal jurisdiction under 28 U.S.C. §§1331, 1338, 2201 and 2202, the Petitioner brought this declaratory judgment action in the U.S. District Court for the Eastern District of New York on December 6, 1988. On August 17, 1990, the District Court granted Respondents' Motion To Dismiss For Lack of Jurisdiction.

The Federal Circuit affirmed on July 29, 1991, and this Petition for Certiorari was filed within ninety (90) days of that date.

This Court's jurisdiction arises from 28 U.S.C. §1254(1).

## STATUTES INVOLVED

This case involves the patent law sections, 35 U.S.C. §§251-252, reproduced at A-17 to A-18; 28 U.S.C. §§2201 (a) and 2202, reproduced at A-19; 37 C.F.R. §§1.56 (a), 1.171 through 1.179, and 1.291, reproduced at A-20 to A-24; and the following notices from the Official Gazette of the United States Patent and Trademark Office, 1095 O.G. 16-17 (September 8, 1988); 1096 O.G. 19 (October 17, 1988); and 1098 O.G. 502-503 (December 8, 1988), reproduced at A-25 to A-29.

## STATEMENT OF THE CASE

Petitioner ("Spectronics") manufactures and sells fluorescent leak detection additives for mobile and stationary air conditioning systems. After Respondents (Fuller) launched an *in terrorem* campaign by letters to the industry announcing their Patent No. 4,758,366 (the '366 patent) and their developing "patent strategy" with respect to their tracer dye line of products, Spectronics filed this action on December 6, 1988, seeking *inter alia* a declaratory judgment of invalidity or non-infringement of the claims of the '366 patent. Spectronics asserted that the '366 patent had been fraudulently procured (fraudulent procurement is frequently designated "inequitable conduct" in the patent law) because of concealment of facts about the prior art and the submission of a false affidavit by the patentee. Fuller made two unsuccessful attempts to dismiss because of the absence of a judicial controversy due to a lack of "reasonable apprehension" on the part of Spectronics.

Fuller then filed in the District Court a "Statement Of Non Liability" comprising a release for past infringement and covenant not to sue for infringement of the cancelled '366 patent claims. Fuller also filed a reissue patent application in the Patent and Trademark Office ("PTO") cancelling all of the claims of the '366 patent and substituting new claims in their place. Since filing its reissue application Fuller has either used its former marking of the patent number or has adopted the patent marking of "Reissue of U.S. Patent No. 4,758,366 Pending" for its widely sold goods.

With the filing of the reissue patent application and the Statement of Non Liability, Fuller's counsel, Alan G. Carlson, Esq., wrote on June 18, 1990 to the undersigned attorney for Spectronics, a letter reproduced at A-30, in which he stated:

In the past, you have stated your concern that the reissue proceeding cannot deal with the inequitable conduct issue. However, inequitable conduct is now a moot issue. *Indium Corp. of America v. Semi-Alloys, Inc.*, 781 F.2d 879, 884 (Fed. Cir. 1985), *cert denied*, 479 U.S. 820 (1986). With respect to the original claims, claims 1-18, those have been cancelled and the Statement of Non Liability precludes any liability by Spectronics. With respect to any new claims

that may come out of the reissue, any defense by Spectronics that those claims are tainted by the alleged inequitable conduct in obtaining the old claims can be asserted later. If new claims emerge from the reissue, and if there is an issue of infringement by Spectronics, and if there is subsequent litigation, Spectronics can raise its claim of inequitable conduct at that time. The dismissal in this case would be without prejudice to Spectronics' right to raise inequitable conduct against new claims at a later date.

Prior to September 8, 1988 the PTO had dealt with inequitable conduct issues. However, on September 8, 1988 by an official notice, the PTO admitted that it was ill equipped to deal with these issues. Hence, it no longer investigates and rejects either original or reissue patent applications on the basis of inequitable conduct, but leaves these issues to the courts. 1095 O.G. 16-17; 1096 O.G. 19; and 1098 O.G. 502-503, reproduced at A-25 to A-29.

Because of Fuller's continuing patent threats, E.I. Du Pont de Nemours & Company ("Du Pont") had not purchased any fluorescent leak detection additive from Spectronics. But for Fuller's threats, Du Pont would have been Spectronics' largest customer for its fluorescent leak detection additives.

On June 20, 1990, Spectronics' counsel advised Du Pont's counsel, James G. Shipley, Esq., about the Statement Of Non Liability asserting "Manifestly, under the statement of Non Liability, any purchases by Du Pont from Spectronics are free from any charge of infringement under patent 4,758,366.", see letter reproduced at A-32.

On June 25, 1990, Mr. Shipley replied in a letter reproduced at A-34:

I have today advised my client, 'Freon' Products Division of Du Pont's Chemical and Pigments Department, that they are free to purchase and/or use fluorescent dyes without regard to the claims of U.S. Patent No. 4,758,366. I have also advised them that there is a chance that this patent may reissue with narrower claims and I have provided them with a copy of the new claims which have been submitted by H. B. Fuller for reissue examination.

At the hearing on Fuller's motion to dismiss on August 17, 1990, the District Court recognized that because of the Official Gazette notices, it alone could pass on Fuller's inequitable conduct, A-16:

MR. SEIDEL: But the case I am talking about, Your Honor, is not that case at all. It's the inequitable conduct which only this court can pass on.

THE COURT: Well, I grant you only I can, the question is whether I have jurisdiction to do it.

I must say you have presented your client's position as attractively as you possibly could. I don't tend to agree with you right now, although as a practical matter, I can understand the frustration because it does seem to me that the likelihood exists that there will be a continuing controversy ultimately resolved in the format of some Declaratory Judgment action or infringement action either here or someplace else. So there is that peculiarity of this case where there is a reasonable likelihood or apprehension of suit but not on these claims.

This statement was incorporated by reference in the Court's Order issued the same day, in which the Court stated, A-14: "For the reasons stated during the Court's extensive discussions with counsel on the record at oral argument held on August 17, 1990, defendants' motion to dismiss for lack of jurisdiction is GRANTED."

## **BASIS FOR JURISDICTION IN THE DISTRICT COURT**

The District Court's jurisdiction in this declaratory judgment patent action is based upon 28 U.S.C. §§1331, 1338, 2201 and 2202.

## **ARGUMENT**

This is a case of first impression. No appellate court, prior to the decision below, had addressed the issues of:

(a) The continuing jurisdiction for a declaratory judgment action originally filed due to *in terrorem* customer threats by the patentee, after the claims of a patent have been cancelled coupled with a non-liability statement, but also coupled with a reissue patent application directed to the same alleged invention, and the continuing usage of a patent marking which includes the patent number on the patentee's goods, or

(b) The refusal of the PTO to deal with fraudulent procurement in a reissue patent application when coupled with the dismissal of a federal court action which could have addressed this issue.

### **Fraudulent Patent Monopolies Have Far-Reaching Social And Economic Consequences**

This Court has long recognized that improper patent monopolies have far reaching social and economic consequences, *Pope Mfg. Co. v. Gormully*, 144 U.S. 224 (1892). These social and economic consequences are of the utmost public interest.

The possession and assertion of patent rights are 'issues of great moment to the public. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246, ... A patent by its very nature is affected with a public interest. As recognized by the Constitution, it is a special privilege designed to serve the public purpose of promoting the 'Progress of Science and useful Arts.' At the same time, a patent is an exception to the general rule against monopolies and to the right to access to a free and open market. The far-reaching social and economic consequences of a patent, therefore, give the public paramount interest in seeing that patent monopolies spring from backgrounds free from fraud or other inequitable conduct and that such monopolies are kept within their legitimate scope.

*Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806, 815-816 (1945).



This Court justified the application of Section 2 of the Sherman Act to fraudulently procured patent monopolies, because of this overriding public interest.

Under the decisions of this Court a person sued for infringement may challenge the validity of the patent on various grounds, including fraudulent procurement. . . . In fact, one need not await the filing of a threatened suit by the patentee; the validity of the patent may be tested under the Declaratory Judgment Act, 28 U.S.C. §2201 (1964 ed.). . . . At the same time, we have recognized that an injured party may attack the misuse of patent rights. . . . To permit recovery of treble damages for the fraudulent procurement of the patent coupled with violations of §2 accords with these long-recognized procedures. It would also promote the purposes so well expressed in *Precision Instrument, supra*, 324 U.S. at 816.

*Walker Process Equipment, Inc. v. Food Machinery and Chemical Corporation*, 382 U.S. 172, 176-177 (1965).

Indeed, the muzzling of those who would attack an invalid patent leads to the public paying tribute to monopolists without need or justification.

Surely the equities of the licensor [patentee] do not weigh very heavily when they are balanced against the important public interest in permitting full and free competition in the use of ideas which are in reality a part of the public domain. Licensees may often be the only individuals with enough economic incentive to challenge the patentability of an inventor's discovery. If they are muzzled, the public may continually be required to pay tribute to would be monopolists without need or justification.

*Icar Inc. v. Adkins*, 395 U.S. 653, 670 (1969).

**Declaratory Judgment Jurisdiction Should Not Be Defeated When The Patentee Files A Reissue Patent Application Directed To The Same Subject Matter So That The Plaintiff Is Still Exposed To *In Terrorem* Attacks On Its Customers**

Fuller's non liability statement and the cancellation of the claims of the '366 patent in the reissue patent application did not terminate Fuller's campaign of terror against Spectronics' customers. This is apparent from the Carlson letter of June 18, 1990, A-30 to A-31, and the June 25, 1990 letter from Du Pont's counsel, A-34.

The Declaratory Judgment Act, 28 U.S.C. §§2201, 2202, was enacted to eliminate similar conduct by patent owners. Chief Judge Markey, in *Arrowhead Industrial Water, Inc. v. Ecolochem, Inc.*, 846 F.2d 731, 734-735 (Fed.Cir. 1984), summarized the history that led to the Declaratory Judgment Act in patent cases:

This appeal presents a type of sad and saddening scenario that led to enactment of the Declaratory Judgment Act (Act), 28 U.S.C. §2201. In the patent version of that scenario, a patent owner engages in a *danse macabre*, brandishing a Damoclean threat with a sheathed sword. ... Guerrilla-like, the patent owner attempts extrajudicial patent enforcement with scare-the-customer-and-run tactics that infect the competitive environment of the business community with uncertainty and insecurity. ... Before the Act, competitors victimized by that tactic were rendered helpless and immobile so long as the patent owner refused to grasp the nettle and sue. After the Act, those competitors were no longer restricted to an *in terrorem* choice between the incurrence of a growing potential liability for patent infringement and abandonment of their enterprises; they could clear the air by suing for a judgment that would settle the conflict of interests.

846 F.2d 731, 734-735 (Fed.Cir. 1984).

In the case at bar, the original *in terrorem* campaign against Spectronics' customers continues by the usage of the patent marking containing the patent number on the patentee's goods.



This Court laid down the guidelines for declaratory judgment actions in patent cases in *Altwater v. Freeman*, 319 U.S. 359 (1943). The facts in *Altwater* were very close to those here present. Freeman's original patent had been litigated. Only three of the 26 claims of the original patent were held valid. Freeman had reissued his patent into two reissue patents. Licensees (petitioners) under the original patent sought relief from a Circuit Court ruling that when the District Court found no license agreement and no infringement, all other issues had become moot. The petitioners relied on their counterclaim for a declaratory judgment seeking to invalidate the reissue patents. In reversing the Circuit Court, Justice Douglas stated:

We have here not only bill and answer but a counterclaim. Though the decision of non-infringement disposes of the bill and answer, it does not dispose of the counterclaim which raises the question of validity.

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"It was to lift the heavy hand of that tribute from the business that the counterclaim was filed. ... It was the function of the Declaratory Judgment Act to afford relief against such peril and insecurity. S. Rep. No. 1005, 73d Cong. 2d Sess. pp. 2-3.

319 U.S. 359 at 363 and 365.

The subject declaratory judgment complaint is the full equivalent of a counterclaim. *Akzona, Inc. v. E.I. Du Pont de Nemours & Co.*, 662 F. Supp. 603, 619 (D.Del. 1987).

The opinion below totally frustrates the purpose of the Declaratory Judgment Act. Fuller has a pending reissue patent application which is already pending over a year, and which Fuller may keep pending for many further years by an *ex parte* appeal to the PTO's Board of Patent Appeals and Interferences, and then to the Court of Appeals for the Federal Circuit. During these many years, Spectronics and its customers are faced with the uncertainty of a possible patent issuing on the reissue application, possible damages exposure under a reissue patent due to 35 U.S.C. §§251-252, and Spectronics' total inability to prove the fraudulent patent

procurement in the courts. Spectronics and its customers are continually reminded of Fuller's patent by the patent marking on Fuller's goods which includes the patent number. As a result, the "sad and saddening" scenario of Judge Markey has been restored.

### **Spectronics Has No Way To Address The Fraudulent Procurement Of The '366 Patent**

The combination of the 1988 policy of the PTO of refusing to address fraudulent patent procurement when examining reissue patent applications and the opinion below has left Spectronics with no relief respecting the fraudulent procurement of the '366 patent.

While 37 C.F.R. §1.291, provides for protest by the public (which would include Spectronics) against pending reissue patent applications, this procedure is exceedingly limited. This was emphasized in the PTO notice from 1095 O.G. 16-17, (A-25). "The Court proceeding involves two participating adverse parties. This is not the case in the Office, since even 'protesting' parties are not permitted to participate under the Rules."

Fuller has shown the way for a fraudulent patent monopolist to avoid any determination of inequitable conduct by the filing of a non liability statement, and yet continue to be able to intimidate an industry by filing a reissue patent application and referring to the patent number in the patent marking on its widely sold goods. The PTO will refuse to address the issue of inequitable conduct and the courts will not have jurisdiction. This results in a mockery of the Declaratory Judgment Act and signals a return to the "sad and saddening scenario" recited by Chief Judge Markey in *Arrowhead*.

### **The PTO Cannot Purge The Fraudulent Procurement Of The '366 Patent**

The futility of the prosecution of the reissue patent application in the PTO is underscored by repeated opinions of the Court of Appeals for the Federal Circuit holding that reissue is not available to rehabilitate a fraudulently procured patent. *Hoffman-La Roche*

*Inc. v. Lemmon Co.*, 906 F.2d 684, 688-689 (Fed. Cir. 1990); *Hewlett-Packard Co. v. Bausch & Lomb Inc.*, 882 F.2d 1556, 1563-1564 fn 7 (Fed. Cir. 1989), *cert. denied* 110 S.Ct. 1125 (1990).

### **Either The PTO Or The Courts, Or Both, Must Deal With Inequitable Conduct When Presented**

This Court in *Precision Instrument*, 324 U.S. at 818 unequivocally directed the PTO to take appropriate action when inequitable conduct is brought to its attention.

But it is clear that Automotive knew and suppressed facts that, at the very least, should have been brought in some way to the attention of the Patent Office, especially when it became evident that the interference proceedings would continue no longer. Those who have applications pending with the Patent Office or who are parties to Patent Office proceedings have an uncompromising duty to report to it all facts concerning possible fraud or inequitableness underlying the applications in issue. *Cf. Crites, Inc. v. Prudential Ins. Co.* 322 U.S. 408, 415. This duty is not excused by reasonable doubts as to the sufficiency of the proof of the inequitable conduct nor by resort to independent legal advice. Public interest demands that all facts relevant to such matters be submitted formally or informally to the Patent Office, which can then pass upon the sufficiency of the evidence. Only in this way can that agency act to safeguard the public in the first instance against fraudulent patent monopolies. Only in that way can the Patent Office and the public escape from being classed among the 'mute and helpless victims of deception and fraud.'

If the PTO is unequipped to handle inequitable conduct, then the courts must do so.

Because of 28 U.S.C. §1295, the Court of Appeals for the Federal Circuit's decision below is a national one, binding all future patent cases. Only this Court can rectify the impasse resulting from the Federal Circuit's opinion.

**CONCLUSION**

For the reasons herein set forth, certiorari should be granted.

Respectfully submitted,

SPECTRONICS CORPORATION

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